United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

No. 76-7631

In the

United States Court of Appeals

For the Second Circuit

ORECK CORPORATION, *Plaintiff-Appellee,* *vs.* **WHIRLPOOL CORPORATION and SEARS, ROEBUCK AND CO.,** *Defendants-Appellants.*	Appeal from the United States District Court, Southern District of New York. — Honorable **Richard Owen,** Judge Presiding.

DEFENDANTS' JOINT REPLY BRIEF.

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Oral Argument Requested.

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PRELIMINARY STATEMENT.

The "Counter-Statement of the Facts" at pages 4-18 of Oreck's brief is a mixed bag filled mostly with innuendo, conclusions, arguments and "facts" not supported by the record. Rather than unnecessarily burdening the Court with a *seriatim* point-by-point response to each of plaintiff's errors, misstatements and misconceptions, we shall respond as necessary in the course of discussing the several reasons why the judgment should be reversed.

ARGUMENT.

I.

ORECK FAILED TO MEET ITS BURDEN OF PROVING AN UNREASONABLE RESTRAINT OF TRADE.

In Section I of their opening brief, defendants assumed, *arguendo*, that Whirlpool terminated Oreck's distributorship by agreement with Sears,* and nevertheless demonstrated that there was no proof that such termination unreasonably restrained trade, and, for this reason, defendants were entitled to judgment in their favor.

Obviously recognizing that it did not prove this essential element of its case, plaintiff grasps at straws to save a judgment that cannot stand, advancing as its principal argument, at pages 30-33 of its brief, that the Whirlpool-Sears action is a "group boycott" which is a *per se* violation of Section 1 of the Sherman Act (15 U. S. C. § 1). This position is untenable. Whirlpool and Sears are not competitors of one another, and the essence of the group boycott which is a *per se* Sherman Act violation is a refusal to deal *by competitors acting in concert.*

Thus, *United States* v. *General Motors Corp.*, 384 U. S. 127 (1966), cited at page 30 of Oreck's brief, involved the agreement of every Chevrolet dealer in the Los Angleles area to refrain from selling automobiles to or through discount houses (384 U. S. at 144-5). In *Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1963), quoted at pages 31-2 of Oreck's brief, all the members of the New York Stock Exchange, acting in concert, refused to provide private direct wire service to the plaintiff. Similarly, in *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207 (1959), quoted at pages 32-3 of Oreck's brief, the Court held a complaint sufficient to withstand a motion to

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* Defendants actually demonstrated in the following section of their original brief that there was no conspiracy.

dismiss, which alleged a refusal to sell to a retailer by *ten* appliance manufacturers and their distributors, all allegedly acting in concert with one another.*

Moreover, the group boycott *per se* rule is explicitly inapplicable to an exclusive distributorship between a manufacturer like Whirlpool and a retailer like Sears. This is clear on the very face of *Klor's, supra*:

> "*This is not a case of . . . a manufacturer and a dealer agreeing to an exclusive distributorship.*" 359 U. S. at 212 (emphasis supplied.)

No case cited by Oreck and none of which defendants are aware holds that an agreement between a manufacturer and his customer for an exclusive distributorship is a *per se* Sherman Act violation as a "group boycott' of some other would-be purchaser.

A manufacturer's exclusive distributorship agreement with a retailer is governed by the rule of reason and can violate the Sherman Act only if it in fact unreasonably restrains trade. In *United States* v. *Topco Associates, Inc.*, 405 U. S. 596 (1972), the Supreme Court set forth the nature of the rule of reason**, and said that it, rather than the *per se* rule, is applicable to most business combinations and contracts (405 U. S. at 607). The Court went on to say that, in deciding whether to apply the *per se* rule or the rule of reason, there is a basic distinction between concerted action of a "horizontal" nature (between competitors on the same level of the market) and:

> ". . . combinations of persons at *different levels* of the market structure, e.g., *manufacturers and distributors*, which are termed 'vertical' restraints." 405 U. S. at 608. (Emphasis supplied.)

Hence, even if plaintiff's distributorship was terminated by agreement between Whirlpool and Sears, the legality of that action

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* *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F. 2d 547 (1st Cir. 1974), although cited at page 32 of Oreck's brief, did not involve a group boycott at all. The court merely noted in passing (508 F. 2d at 559) that group boycotts are *per se* Sherman Act violations, citing *Klor's, supra.*

** As noted in defendants' opening brief at 17.

must be tested under the rule of reason, *not* subjected to the rule of *per se* illegality which might apply if Whirlpool and Sears were competitors of one another.

Nor is there merit in Oreck's alternative attempt to escape from the rule of reason by arguing, at page 33 of its brief, that the termination of its distributorship left Sears in a "permanent monopoly position" in the "market" for "Whirlpool vacuum cleaners". That an anti-trust "market" includes all products which are *functional substitutes* for one another, is a proposition too clear to require a lengthy citation of authorities, a proposition recognized in *George R. Whitten Jr., Inc.* v. *Paddock Pool Builders, Inc., supra,* 508 F. 2d at 550-552, cited by Oreck at page 32 of its brief, wherein the Court cited, among other cases, *United States* v. *E. I. duPont deNemours & Co.,* 353 U. S. 586, 593 (1957) and *Brown Shoe Co., Inc.* v. *United States,* 370 U. S. 294, 326 (1962). There is no "market" for Whirlpool vacuum cleaners because there is not a scintilla of evidence of any functional uniqueness of vacuum cleaners manufactured by Whirlpool, as opposed to those manufactured by Hoover, Electrolux, Eureka, Oreck's new supplier, nor any of the other over twenty companies which in the aggregate manufacture millions of vacuum cleaners each year for sale in the United States. Since there is no such "market", it is patently impossible for Sears to have a "monopoly" of it.

It would not matter even if the Whirlpool brand did impart unique value to vacuum cleaners, and even if there were a consumer preference for the "well advertised" Whirlpool brand vacuums over an "unknown" brand, as Oreck argues at pages 37 and 42 of its brief. Assuming *arguendo,* both that these facts are true and that they are sufficient to constitute a separate "market" for Whirlpool brand vacuum cleaners, Sears does not now and has never even competed in that "market", much less had a "monopoly" of it as implied at page 33 of Oreck's brief. The only vacuum cleaners which Sears ever purchased from Whirlpool bore *Sears' own brand.** No one "monopolized" the

* As noted at page 4 of defendants' opening brief.

"market" for Whirlpool brand vacuum cleaners except Oreck itself, whose contract to distribute them, while in effect, was on its face exclusive in the United States (PX 3, 44).

Oreck's reliance, at pages 33-4 of its brief, upon *Industrial Building Materials, Inc.* v. *Interchemical Corp.*, 437 F. 2d 1336 (9th Cir. 1971), is misplaced. The court's decision was expressly based upon the monopoly power or near monopoly power of the defendant manufacturer:

> "Here Presstite is alleged to have monopoly power, or at least to hold a dominant position in the market, so that any action tending to strengthen that position would be an unreasonable restraint of trade. *See United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 343 (D. Mass. 1953), *affd. per curiam*, 347 U.S. 521, 74 S. Ct. 699, 98 L. Ed. 910 (1954). *We need not decide what result we would reach if the same actions were taken by a less powerful member of the industry.*" (437 F. 2d at 1343.) (Emphasis supplied footnote omitted.)

Here, there is no contention that Whirlpool had monopoly power or dominance in the vacuum cleaner market, and we have already shown that Oreck's attempt to paint Sears as a monopolist of Whirlpool vacuums is specious.

Equally inapplicable is *Perryton Wholesale, Inc.* v. *Pioneer Distributing Co. of Kan.*, 353 F. 2d 618 (10th Cir. 1965), *cert. denied*, 383 U. S. 945 (1966), which Oreck cites at page 34 of its brief. That case involved a horizontal level conspiracy to actually destroy a competitor by subversion of its employees and other forms of common law unfair competition, *not* a mere refusal to deal where, as here, other sources of supply were concededly available.

Oreck attempts to bring itself within the holdings of these two cases by portraying itself, at page 33 of its brief, as having been "removed" from the market for vacuum cleaners in general, and, at page 35 of its brief as the victim of "elimination" from the "domestic vacuum cleaner market". These representations to this Court are just plain false. It is undisputed that

Oreck did in fact obtain another source or sources of supply of vacuum cleaners following termination of its Whirlpool distributorship (A. 408-9) and equally undisputed that it continued to sell vacuum cleaners up to the time of trial, preening itself as "the world's largest seller of top-fill uprights" (A. 877-9; DX U).

Oreck next argues, at pages 33-36 of its brief, that inquiry into availability of reasonably substitutable goods is appropriate under the rule of reason only where there is a simple distributor replacement with no net reduction in number of distributors or no termination of an existing customer. The cases hold to the contrary. There was a net reduction from three distributors to one in *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F. 2d 418 (D. C. Cir. 1957), *cert. denied* 355 U. S. 822 (1957), and an existing customer was terminated and not replaced in *E. A. Weinel Construction Co.* v. *Mueller Co.*, 289 F. Supp. 293 (E. D. Ill. 1968). These decisions held those actions lawful because of availability of substitutes. They were cited at pages 15 and 16, respectively, of defendants' opening brief. They have been ignored by Oreck, but ignoring them does not make them go away. As the court held in *Packard Motor, supra,* 243 F. 2d at 421:

> "The fact that any other dealers in the same product of the same manufacturer are eliminated does not make an exclusive dealership illegal; it is the essential nature of the arrangement. The fact that Zell [the dealer] asked for the arrangement does not make it illegal. Since the immediate object of an exclusive dealership is to protect the dealer from competition in the manufacturer's product, it is likely to be the dealer who asks for it." (footnote omitted.)

The rule of law which is applicable to this case is set forth succinctly in *Elder-Beerman Stores Corp.* v. *Federated Department Stores, Inc.*, 459 F. 2d 138 (6th Cir. 1972):

> "The Supreme Court has dealt with the question of exclusive arrangements between supplier and seller as related to a claimed conspiracy in restraint of trade on more

than one occasion. In this field there has been laid down a *rule of reason*. . . ." (at page 144, emphasis in original.)

* * * * *

We interpret the "rule of reason" as meaning that the granting of exclusive selling rights or acceptance of such exclusive selling rights, acts which are not prohibited by law unless there is a resulting foreclosure of market alternatives cannot, without proof of such foreclosure, form the basis for a jury verdict that the defendants had entered into a conspiracy to restrain trade. In this case we find that the evidence of the exclusive arrangements between Rike's and the named suppliers was insufficient to establish that Elder-Beerman was foreclosed from market alternatives . . ." (at pages 146-7, footnote omitted.)

There was no foreclosure of market alternatives here. Other vacuum cleaners were available to, and were purchased by Oreck for resale. Once those undeniable facts emerged, defendants were entitled to have the case taken from the jury, either by directed verdict or by a judgment *n. o. v.*

Oreck's argument, at page 37 of its brief, that it was foreclosed from the Canadian market ignores the undisputed fact that, while a Whirlpool distributor, Oreck did sell Whirlpool machines in Canada (PX 29, 39, A. 118-119, 150-151, 154-155 416-418). Upon termination of its Whirlpool distributorship, Oreck obtained vacuum cleaners from another source (A. 408-409, 887-889) which it likewise sold or could have sold in Canada (A. 421-423).

It is unnecessary to respond at length to Oreck's argument, at page 38 of its brief, that alleged restraints upon its conduct as a Whirlpool distributor *before* 1972 could have supported a finding that the termination was an unreasonable restraint of trade. As we have already pointed out, here and in our opening brief, the litmus of legality of that termination, even if pursuant to Whirlpool-Sears agreement, is whether reasonably substitutable products were available to Oreck, as they undeniably were and obviously still are. This test would dictate legality of Oreck's

termination even if the record supported Oreck's argument at page 38 of its brief that its conduct as a Whirlpool distributor prior to the termination was restrained.*

Not only did Oreck fail to prove the unavailability of reasonable substitutes which was an essential element of its case, but the record affirmatively establishes that substitutes were in fact available. For this reason alone, even if Oreck was terminated pursuant to agreement between Whirlpool and Sears, the termination was lawful, as a matter of law, and the trial court's refusal to direct a verdict or grant a judgment *n. o. v.* was error.

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* *There was no restraint on price competition with Sears:* There is not a scintilla of evidence that anyone interfered in any way with Oreck's right to decide upon its own prices.

There was no restraint on mail order competition with Sears: Commencing in 1967, an ever-increasing part of Oreck's business was direct mail, so that, by 1970, virtually *all* of its business was mail order (A. 306), and its direct mail solicitations trebled from 1970 to 1971 (A. 382).

There was no conspiracy to restrain Oreck's private label business: Oreck itself deposed Payne, the important "missing witness" described at pages 4-6 and 22-23 of its brief, and who, according to page 22, "blew the whistle" on Sears. Oreck's own counsel read to the jury Payne's deposition testimony (A. 531-8) that Whirlpool's refusal to make private label goods for Oreck was his (Payne's) decision and that Sears had nothing to do with it.

There was no restraint on Canadian sales: We have already shown that Oreck in fact sold in Canada while it was a Whirlpool distributor.

II.

ORECK DID NOT PROVE A CONSPIRACY BETWEEN WHIRLPOOL AND SEARS.

As defendants demonstrated in their opening brief, there is no competent evidence of a conspiracy between Whirlpool and Sears. Rather, the record establishes that Whirlpool unilaterally decided to terminate its agreement with Oreck because Oreck reneged on the original understanding that it would establish the new department store channel of distribution which Whirlpool desired for its vacuum cleaners and possibly other small appliances (A. 804-805). Instead, Oreck concentrated all of its efforts upon direct mail solicitations, which, as pointed out in defendants' opening brief, at pages 7-8, were laden with misrepresentations, a fact Oreck cannot deny and has not denied. Upon being notified of Whirlpool's decision to terminate, Oreck pleaded for three more years so it could recoup its investment (A. 171-2, 176-7, 430-1; Tr. 1433). Whirlpool agreed, and entered into a new agreement with Oreck (PX 44) which expired by its terms on December 31, 1971. On the expiration date, Oreck owed Whirlpool more than $220,000 for goods sold and delivered, which it refused to pay (A. 442-3, 580, 586-7), forcing Whirlpool to sue in order to collect what it was owed (A. 443).

In support of its contention that Whirlpool and Sears conspired to terminate its distributorship, Oreck relies upon (i) the testimony of the Messrs. Oreck as to statements allegedly made to them by Whirlpool's employee, Payne (Oreck's brief at pages 5-6, 23-25), (ii) upon an adverse inference it claims resulted from the fact that Whirlpool did not present Payne's live testimony (Oreck's brief at pages 4-5, 22-3) *after his deposition had been read to the jury at length* (Tr. 405-428, 714-753), and (iii) upon an inference of conspiracy it claims arises from what it characterizes as irrational economic behavior of Whirl-

pool (Oreck's brief at 16-18, 22). None of these arguments has merit.

As defendants noted at page 22 of their opening brief, the testimony of Payne's out of court statements was not admissible against Sears to prove that it conspired with Whirlpool. Payne was not employed by Sears, did not deal with Sears, and his statement that he thought Sears "got to the head of" Whirlpool was admitted by Oreck to be a mere assumption (A. 437-439).

Nor was the testimony of Payne's out of court statements admissible against Whirlpool, his employer, to prove a conspiracy since Oreck failed to lay a proper foundation disclosing that Payne had authority to make the statements attributed to him or that his conclusions were based upon facts and not upon rumor, hearsay or supposition.

In *Northern Oil Co., Inc.* v. *Socony Mobil Oil Co., Inc.*, 347 F. 2d 81 (2d Cir. 1965), this Court held that it was reversible error to admit the alleged statement of Socony's employee introduced by the plaintiff where, as here, the plaintiff failed to produce evidence that the employee had authority to make the alleged statement and also failed to introduce evidence as to the character of the employee's knowledge:

> ". . . for example, whether it was itself founded on office rumor and hearsay, or whether the employee was privy to the corporation's motives. The fact that the employee was 'in charge' of the Albany office while his superior was out of town is no guarantee in a large corporation that he spoke with the authoritative voice of corporate management." (at page 85.)

Oreck came forward with no evidence that Payne was authorized to make the statements attributed to him or as to the character of the knowledge he possessed, if any. To the contrary, the record discloses that Payne was a Product Manager whose responsibility was limited to production, inventory, scheduling, design, quality and service, and that he was not

responsible for policy (A. 577). He did not participate in either the recommendation or the decision that Whirlpool terminate its relationship with Oreck (A. 516), and had no contact with Sears personnel. To the extent that the record discloses whether Payne's out of cour statements were themselves based upon actual knowledge, as opposed to rumor, hearsay or supposition, it consists solely of the explicit admission of Oreck's own president that Payne did not have actual knowledge and was only speculating (A. 437-439).

This total failure to lay the foundation required by *Northern Oil* renders the hearsay testimony of Payne's alleged statements inadmissible against either defendant to prove the alleged conspiracy. The reception of such testimony was therefore erroneous. As stated in *Flintkote Co.* v. *Lysfjord,* 246 F. 2d 368, 385 (9th Cir. 1957), *cert. denied,* 355 U. S. 835 (1957), discussed on page 22 of defendant's opening brief:

> "We cannot pass on whom the jury could, or should believe, but we have the duty of seeing that any evidence, ordinarily inadmissible as hearsay, is admitted into evidence for the jury to consider only when a proper foundation for its admission has been laid."*

Nor would Payne's statements to the Orecks prove a conspiracy even if they were admissible for that purpose. Four of his six statements concerned Oreck's request that Whirlpool supply it with private label vacuum cleaners. With something

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* Nor was the hearsay testimony admissible under Rule 804 (b)(3) of the Federal Rules of Evidence as a statement "against interest", as suggested by the note at page 28 of Oreck's brief. Rule 804(b) by its own terms is limited to situations where the declarant "is unavailable as a witness", which means, *inter alia,* that the proponent of the hearsay testimony has been unable to obtain the declarant's testimony "by process or other reasonable means", Rule 804(a)(5). Oreck concedes that Payne was in the courtroom during presentation of Oreck's case, to the knowledge of all concerned, and that his testimony not only could have been obtained, but it would have been obtained by process had Oreck's counsel only asked the judge to issue a trial subpoena. (Tr. 1673-1676.)

less than candor, Oreck did not advise this Court that its own counsel read to the jury *Payne's deposition testimony that Sears had nothing to do with Whirlpool's refusal,* and that he, Payne, rejected the request because he already had more problems with Oreck than he could handle (A. 531-8).

The fifth Payne statement was made to and described by David Oreck (Oreck's brief at 23-4) and was to the effect that he (Payne) thought Whirlpool served Oreck with notice of termination in 1968 because the "other customer got to the head of the company". On cross-examination, the witness, David Oreck, plaintiff's president, was compelled to admit that Payne did not know the reason for Whirlpool's action but was simply making an assumption (A. 437-439).

The sixth Payne statement, described at page 23 of Oreck's brief, was made over four years before Oreck's Whirlpool distributorship was actually terminated, and was to the effect that Payne wanted Oreck to discontinue its direct mail sales because Sears had complained. Entirely aside from the absence of any showing of the source (and there was none) of Payne's knowledge that Sears had complained (and it did not), this does not prove a conspiracy. As pointed out at page 23 of defendants' opening brief, the mere fact that one customer complains to Whirlpool about the practices of another does not support an inference of an unlawful conspiracy and, in addition to being a customer, Sears was also a Whirlpool shareholder, in which capacity it clearly had a right to bring to the attention of Whirlpool's management a matter which it considered detrimental to the interests of Whirlpool (See, PX 60, A. 830-831). Thus, Oreck's testimony of the statements allegedly made by Payne, even if admissible, does not prove a conspiracy.

Nor could any adverse inference be drawn because defendants did not call Payne as a witness. There was no reason to call Payne. Plaintiff admitted (A. 437-439) that Payne did not know Whirlpool's reason for terminating Oreck's distributorship. Plaintiff itself read to the jury Payne's deposition testimony that he did

not participate in and was not consulted about Whirlpool's decision to end its relationship with Oreck (A. 516), and that he (Payne) decided Whirlpool would not make private label goods for Oreck and Sears had nothing to do with it (A. 531-8). Finally, if Sears objected to Oreck's shoddy direct mailings, such objection was appropriate, lawful and does not support an inference of conspiracy. Accordingly, if the verdict is based upon an inference of conspiracy drawn from Whirlpool's failure to call Payne, as Oreck argues at page 23 of its brief, reversal is required.

We should add that, contrary to page 6 of Oreck's brief, Whirlpool did object to the instruction that inferences adverse to it might be drawn from its failure to call Payne (Tr. 1670-1676). Also contrary to Oreck's argument, no such instruction was given or could properly have been given against Sears, which had no more control over Payne than did Oreck itself.

Nor did plaintiff prove economic irrationality on the part of Whirlpool. As noted at length at pages 5-8 of defendants' opening brief, Whirlpool's overriding goal was distribution of vacuum cleaners bearing its brand through department stores and other key retail accounts. For this reason, Whirlpool was displeased when Oreck abandoned its efforts to sell to those accounts in favor first of janitorial supply houses and other commercial accounts (A. 769-772, 784) and later in favor of sales by mail directly to the public (A. 500-506, 796-797). From this perspective, it is hardly surprising, much less sinister, that Whirlpool declined Oreck's request to re-design its shipping cartons to facilitate sales by direct mail.

Nor was it irrational or sinister for Whirlpool to refuse to sell to Oreck its closing inventory of Whirlpool brand vacuums after Oreck's distributorship expired on December 31, 1971, since it is undisputed that Oreck already owed Whirlpool over $220,000 for goods previously sold and delivered which it refused to pay (A. 442-3, 580, 586-7). Whirlpool's employee Steeb (Payne's superior) testified that either the Credit or Legal Department had forbidden further shipments to Oreck until the

outstanding balance (which exceeded Oreck's credit limit at Whirlpool) was paid (A. 581-2). Steeb further testified that, after December 31, 1971, his department delayed attempting a sacrifice sale of the closing inventory in the hope that Oreck would pay its bill and thereby obtain Credit and Legal Department clearance to buy the closing inventory (A. 582). Steeb's testimony is uncontroverted.

Oreck's argument at page 16 of its brief that its business was profitable for Whirlpool rests upon an indefensibly exaggerated view of the record. The only evidence of profitability is that the Oreck business was not profitable to Whirlpool when Whirlpool served notice of termination effective in 1968, and was profitable in 1971 (A. 489, 512-513), when Oreck in anticipation of the termination purchased an abnormally large supply of vacuum cleaners which lasted into 1973 (A. 445-447).

Obviously with tongue in cheek, Oreck chides defendants for calling only a few of a plethora of possible witnesses, asserting at page 7 of its brief that there were many other employees of Sears and Whirlpool who could have been called to deny a conspiracy. Granted that defendants did not call all of the employees of Whirlpool and Sears. However, they did, as required by *Interstate Circuit, Inc.* v. *United States,* 306 U. S. 208, 225-226 (1939), cited on page 23 of Oreck's brief, call each and every person who had authority to act for defendants in connection with the matters before the Court and who were in a position to know whether they acted in pursuance of agreement. The testimony of these witnesses is discussed on page 12 of defendants' initial brief. All denied that Sears was in any way involved in the termination. When, at the trial, Oreck advanced the proposition that defendants did not call other witnesses, the trial court made short shrift of the contention, commenting that defense counsel ". . . has not been putting on office boys and mail carriers; he has been putting on people who have been in the direct flow" (Tr. 1580).

Nor was the testimony of each of defendants' witnesses "completely discredited or shown to have no meaning whatsoever," as stated at page 8 of Oreck's brief. This remarkable assertion is followed by citations to the *entire* cross-examination of each of these witnesses in gross. Oreck was unable to direct this Court to one specific page in the record which discloses that it discredited a defense witness or showed that his testimony had no meaning. In fact, the cross-examination in which Oreck professes such pride was utterly innocuous.

Recognizing that the evidence is insufficient to support a finding of conspiracy, Oreck resorts to the desperate argument that Whirlpool and Sears "had the opportunity" to have discussions concerning Oreck and its termination. (Plaintiff's brief, pages 12-13). Of course they had, but that is not the question. The question is did they have such discussions. The answer is an unequivocal "no," and the only meeting to which Oreck refers this Court was a meeting between Mr. Button, Sears Executive Vice President in charge of merchandising, and Mr. Upton, Whirlpool's Vice President in charge of sales to Sears, at which they discussed the line of merchandise which Whirlpool was selling to Sears. Oreck was not mentioned at that meeting. Aside from the fact that there is not one iota of testimony that Oreck was discussed, it is simply amazing that Oreck asks this Court to find a sinister implication in a meeting between a manufacturer and a large customer.

Finally, Oreck's brief at pages 20-22 admonishes defendants that the record in its entirety must be evaluated for proof of a conspiracy and that the conspiracy may be proved by circumstantial evidence. Defendants do not quarrel with these abstract propositions of law, but rather have demonstrated that there was here no competent evidence, either direct or circumstantial, which could support a finding of conspiracy. The case is therefore controlled by this Court's decision in *Michelman* v. *Clark-Schwebel Fiber Glass Corp.*, 534 F. 2d 1036, 1042 (2d Cir. 1976):

"If, however, after viewing all the evidence most favorably to plaintiff, we cannot say that the jury could reasonably have returned the verdict in his favor, our duty is to reverse the judgment below. The jury's role as the finder of fact does not entitle it to return a verdict based only on confusion, speculation or prejudice; its verdict must be reasonably based on evidence presented at trial."

Applying this controlling rule of law to the record of this case as a whole, it is clear that the court should have directed a verdict because the jury could not reasonably have found that Whirlpool and Sears conspired to terminate Oreck's distributorship, and for this reason, too, reversal is required.

III.

ORECK DID NOT PROVE THAT IT WAS INJURED OR THE AMOUNT OF ITS DAMAGES.

Oreck does not dispute that in this case, based upon exclusion from a specified source of supply, the requisite proof of the fact of injury is that alternative comparable merchandise was not available. *Elder-Beerman Stores Corp.* v. *Federated Dept. Stores, Inc.*, 459 F. 2d 138, 148-9 (6th Cir. 1972). In this case it is not only undisputed that alternative sources of vacuum cleaners were available, but it is also undisputed that after its Whirlpool distributorship was terminated, Oreck obtained another source of supply. Unable to deny these undisputed facts, Oreck argues, at pages 41-42 of its brief, that it was unable to obtain a new source immediately, and that its replacement product was not fully comparable to the Whirlpool brand machines. This argument is totally unsupported by the record. There is not a scintilla of evidence of any difficulty or delay encountered by Oreck in obtaining a new supplier and its success in selling its new product was such that by Oreck's own admission it was at the time of trial "the world's largest seller of top-fill uprights" (DX U). Accordingly, for the reasons dis-

cussed above and in defendants' original brief, plaintiff has not proven the fact of damage.

Even assuming that Oreck proved the fact of damage, its proof of the amount of damage is so speculative as to require reversal. In their opening brief (pp. 27-36), the defendants demonstrated that plaintiff's damage evidence was purely speculative and showed why it could not support a verdict. Plaintiff does not meet these arguments. Rather, it argues that it is proper to project damages into the future and that proof of damages need not be completely mathematically accurate, propositions conceded in defendants' original brief. It also notes that the jury did not award the astronomical sum Oreck developed from its speculative proof. Thus Oreck itself demonstrated that the jury plucked the amount of its verdict out of thin air.

It is self-evident, as noted in defendants' original brief (p. 35), that because Oreck sold both vacuum cleaners and residuals there necessarily will be a "relationship" between those sales and a resulting average profit or loss on each of the two products sold during a given year. However, it does not necessarily follow, and there is no evidence, that either the "relationship" or the average profit and loss in one year is representative of the "relationship" or profit and loss in prior or subsequent years. Yet plaintiff's proof of damages was improperly based upon the assumption that both the "relationship" and average profit never changed from year to year since its entire claim of damages is based solely upon its experience in 1972.

Information from which the "relationship" and profit or loss for each year prior to 1972 and for the four years which elapsed between the date Oreck's distributorship was terminated and the date of trial was available and should have been placed before the jury. To permit plaintiff to ignore the facts and, over defendants' objection (A. 733), to place before the jury its assumption as to the results of its operations during the years prior to 1972 or as to the four year period after the termination

and before the trial, and then permit the jury to assess damages predicated upon that assumption, was error.

Recognizing the deficiency in its proof, plaintiff argues, at page 46 of its brief, that if it had given the jury facts rather than assumptions the damages would have been larger. There is no support in the record for this statement. Defendants question its accuracy. In any event, the jury was entitled to know the facts, whether helpful to plaintiff or defendants, and to base its verdict on facts, not plaintiff's assumptions.

Plaintiff tacitly concedes the propriety of defendants' position that the jury is entitled to the most accurate information available when it argues, at page 48 of its brief, that in presenting its damage evidence to the jury it used only the 1972 residual sales because it was the most recent year before the cancellation and therefore represented the "most accurate calculation." Why Oreck's records for 1972 are more accurate than its records of the preceding and succeeding years is not explained. In any event, the jury was entitled to all the facts. It was entitled to know the number of vacuum cleaners and residuals sold and profits or losses resulting therefrom both as to the years prior and subsequent to 1972. It then could have determined whether the "relationship" and resulting profit in 1972 was in fact typical of prior years and, therefore, reliable for projecting the future. Instead of the facts, it was presented with unsupported assumptions, and the resulting verdict was therefore based on pure guess. For this reason, too, reversal is required.

CONCLUSION.

For each and all of the foregoing reasons, the trial court's judgment should be reversed, and the cause should be remanded with directions to enter judgment in favor of defendants.

Respectfully submitted,

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STATE OF ILLINOIS, }
COUNTY OF COOK. } ss. ...L. Brodman... being first duly

sworn, deposes and says that he served ..two.... copies of the ....

Reply Brief

in the above entitled cause, as per statute herein made and provided, on

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and also filed the required number of copies of the above with the ....

U. S. Court of Appeals, Second Circuit

this ......23rd...... day of ......May......, A. D. 19 77

L. Brodman

Subscribed and sworn to before me this 23rd

day of ......May......, A. D. 1977

Rose Marie Kremske

Notary Public.